

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
GREGORY GORDON, KIN VASQUEZ and
KENNETH KIDD,

Plaintiffs,

- against -

THE COUNTY OF ROCKLAND and REV. TERESA
DARDEN CLAPP, in her individual and official capacity
as a Correction Officer employed by the County of Rockland,

Defendants.
-----X

REPLY MEMORANDUM
OF LAW

Civil Action No. 10 Civ. 1549
(RPP)

**DEFENDANTS' REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF SUMMARY JUDGMENT**

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POINT I

**ALL CLAIMS ASSERTED AGAINST REVEREND CLAPP IN HER
OFFICIAL CAPACITY SHOULD BE DISMISSED AS A MATTER OF
LAW AS PLAINTIFFS HAVE FAILED TO ESTABLISH A CUSTOM
OR POLICY ON THE PART OF THE COUNTY OF ROCKLAND**

Because plaintiffs cannot sustain a § 1983 claim against the County, there is no viable claim against Reverend Clapp in her official capacity.

“Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits in contrast, ‘generally represent only another way of pleading an action against an entity of which an officer is an agent.’ As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official’s personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.” (Kentucky v Graham, 473 US 159, 165-166 [1985], quoting Monell v New York City Dept. of Soc. Servs., 436 US 658, 690 n. 55 [1978] [emphasis in original][internal citation omitted]; see Rothenberg v Daus, 2010 WL 3860425 *17 [SDNY 2010]; Decker v Campus, 981 F Supp 2d 851, 861 [SD NY 1997]).

“On the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. More is required in an official-capacity action, however, for a governmental entity is liable under § 1983 only when the entity itself is a ‘moving force’ behind the deprivation, thus, in an official capacity suit the entity’s ‘policy or custom’ must have played a part in the violation of federal law” (see Kentucky v Graham, 473 US at 166 [emphasis in original]).

Here, the allegations against the County and Reverend Clapp primarily involve a single isolated incident in which Rev. Clapp inadvertently distributed the subject tracts, which remained in circulation about the inmate population for a few days. This singular incident, even when

taken together with plaintiffs remaining allegations concerning use of the Koran, availability of an imam, and the location for prayer services, does not amount to a custom or policy on the part of the County designed to deprive plaintiffs of their constitutional rights nor does it constitute a substantial burden on plaintiffs' religious rights.

The plaintiffs have voluntarily withdrawn all claims asserted against the County of Rockland [see Plasse Declaration, paragraph 10]. Defendants submitted evidence which establishes that the County did not have a custom or policy to deny the religious rights of plaintiffs. The plaintiffs have submitted nothing more than conclusory and unsubstantiated allegations that the County had a custom or policy to deprive them of their constitutional rights. Furthermore, plaintiffs have failed to set forth a triable issue of fact demonstrating that their constitutional rights were substantially burdened.

A. Distribution of Subject Tracts

"[F]or plaintiff's claims of custom or policy to survive summary judgment review, there necessarily must be evidence of the complained-of activity by defendants in similar circumstances outside the present case" (Lipton v County of Orange, NY, 315 F Supp 2d 434, 453 [SD NY 2004]). Plaintiffs have failed to set forth any evidence or facts pointing to any other instance in which Rev. Clapp or any other County employee distributed literature in the prison which was inflammatory to Muslims. Nor do plaintiffs set forth facts, except in conclusory fashion, of complained of activities outside of the six week time frame alleged in the complaint.

This single incident, conducted by a subordinate employee, which was timely addressed by the Sheriff's Department does not constitute a custom or policy sufficient to establish a violation of plaintiffs' rights under §1983 (see Riccui v New York City Tr. Auth., 941 F2d 119,

123 [2d Cir 1991]; Lipton v County of Orange, NY, 315 F Supp 2d at 453; Pressley v Green, 2004 WL 2978279, *5 [SD NY 2004]).

B. Hiring of an Imam

Specifically, the plaintiffs allege that “the County of Rockland failed to hire anyone to lead the Muslim Services in an effort to discourage and hinder said religious observance” [see Ex. “A,” paragraph 23]. As set forth in the affidavit of Captain Conjura, the County lacked the budgetary funds to hire an imam during the time period in the complaint [see Conjura Aff. at page 5-6; Ex. “K” at 10]. Contrary to the speculative allegations contained in the affidavit of plaintiff Kenneth Kidd, that “after the problem with Rev. Clapp was in the media, suddenly the jail has money to hire an Imam. . .,” the County’s budgetary constraints remained the same; a volunteer imam was located and engaged to provide services to Muslim inmates [see Conjura Aff. at page 5-6]. Of note, plaintiffs do not dispute defendants’ contention that despite the absence of an imam, Muslim prayer services continued uninterrupted and were facilitated by plaintiff Kenneth Kidd, as spiritual leader among the Muslim inmate population [see Plaintiffs’ Ex. “B” and “C”]. The lack of an imam during the six week time period alleged in the complaint does not constitute a substantial burden on plaintiffs constitutional rights nor does it establish a custom or policy on the part of the County to deprive plaintiffs of their constitutional rights; and as such, plaintiffs complaint should be dismissed (see Cruz v Beto, 405 US 319, 322 n. 2 [1972]; Guarneri v Hazzard, 2010 WL 1064330, at *18 [ND NY 2010]; Davidson v Davis, 1995 WL 60732, at *5-6 [SD NY 1995]; Muhammad v City of New York Dept. of Correction, 904 F Supp 161, 189 [SD NY 1995]).

C. Muslim religious services within the Jail

Even assuming the allegations in the plaintiffs' complaint are true, plaintiffs have failed to establish, as a threshold matter, that the inconvenience of having prayer services in the barbershop during the six-week period alleged in the complaint was a substantial burden of their religious rights or constituted a custom or policy on the part of County to deprive plaintiffs of their constitutional rights (see Guarneri v Hazzard, 2010 WL 1064330, at *17). Again, the plaintiffs do not dispute defendants' contention that during the time period alleged in the complaint Muslim prayer services continued uninterrupted and were facilitated by plaintiff Kenneth Kidd, as spiritual leader among the Muslim inmate population.

D. Use of the Noble Koran

Plaintiffs do not assert a direct allegation against the County regarding the use of the Koran. Specifically, plaintiffs allege "From March 26, 2007 to May 7, 2007, Rev. Teresa Darden Clapp refused to permit the plaintiffs from using the Quran in the Rockland County Jail." Plaintiffs do not dispute that Rev. Clapp distributed jail approved Korans to the inmate population in accordance with her responsibilities [see Plaintiffs' Ex. "B" and "C"]. Moreover, as a threshold matter, plaintiffs do not set forth any proof, other than plaintiffs' conclusory assertions that the use of the jail approved translation of the Koran instead of the Noble Koran constitutes a substantial burden on their religious beliefs (see e.g. Sostre v McGinnis, 334 F2d 906, 911 [2d Cir 1964], cert. denied 379 US 892 [1964] [recognizing that prisons may circumscribe religious content by rules and regulations which will permit the authorities to maintain discipline in the prison and failing to permit prison officials do to so "would be to compel the prison officials to permit inmates to purchase and disseminate in the prison literature

advocating and encouraging the very conduct which the prison authorities may lawfully suppress”)).

To the extent that the plaintiffs have withdrawn all claims as against the County and have not raised a material issue of fact to refute the County’s prima facie establishment that it did not have a custom or policy to deny the religious rights of plaintiffs, all claims asserted against the County and against Reverend Clapp in her official capacity should be dismissed as a matter of law (see Anthony v City of New York, 339 F3d 129, 140 [2d Cir 2003])[granting summary judgment and dismissing plaintiffs §1983 claims asserted against the City and police officers in their official capacities where plaintiff failed to establish an official policy or custom by the City]; Bryant v Maffucci, 923 F2d 979, 986 [2d Cir 1991] [granting summary judgment dismissing plaintiff inmate’s § 1983 claims against Commissioner of County Department of Corrections, and others, in their official capacities, to recover for inability to obtain an abortion in 24th week of pregnancy, where inmate failed to set forth any evidence that this single isolated incident did not constitute a custom or policy to deny her right to due process]; Robinson v Sarreck, 1993 WL 427416, *3 [SD NY 2010][granting summary judgment dismissing plaintiff inmate’s §1983 claims against defendant sheriff, jail administrator and doctor, in their official capacities, where plaintiff failed to establish that County had a custom or policy to deprive inmates of medical treatment]; see also Houriha v Lafferty, 58 F Supp 2d 10, 13 [ND NY 1999]; Fahle v Braslow, 913 F Supp 145, 151 [ED NY 1996], aff’d 111 F3d 123 [2d Cir 1997]).

POINT II

ALL CLAIMS ASSERTED AGAINST REVEREND CLAPP IN HER PERSONAL CAPACITY SHOULD BE DISMISSED AS HER ACTIONS AMOUNTED TO NOTHING MORE THAN MERE NEGLIGENCE WHICH DOES NOT RISE TO THE LEVEL OF CONSTITUTIONAL VIOLATIONS.

Plaintiffs' allegations regarding the hiring of an imam are made specifically against the County and not against Rev. Clapp in her personal capacity; as such, Rev. Clapp is entitled to summary judgment on this issue. Plaintiffs' complaint does not make a specific allegation against Rev. Clapp regarding the alleged holding of prayer services in the barbershop; nonetheless, Rev. Clapp has established her prima facie entitlement to judgment on this issue and plaintiffs have failed to raise a triable issue of fact. In their complaint, as against Rev. Clapp specifically, plaintiffs allege that she (1) refused to permit plaintiffs to use their Korans; and (2) repeatedly and continuously distributed two tracts. Rev. Clapp has established her prima facie entitlement to judgment on these two issues and plaintiffs have failed to raise a triable issue of fact.

To recover under 42 U.S.C. §1983, a plaintiff must establish (1) deprivation or denial of a constitutional right (2) by a person acting under the color of state law (see Sutton v Tompkins County, 617 F Supp 2d 84, 92 [ND NY 2007], citing Patterson v Coughlin, 761 F2d 886, 890 [2d Cir 1985], cert. denied 474 US 1100 [1986]).

"To defeat a summary judgment motion, the non-moving party must do more than simply show that there is some metaphysical doubt as to the material facts. Instead, the non-moving party must set forth specific facts showing that there is a genuine issue for trial" (Tafari v Annets, 2008 2413995, *9 [SD NY 2008], adopted by 2008 WL 9449372 [SD NY 2008], aff'd 363 Fed Appx 80 [2d Cir 2010], cert. denied 2010 WL 1652961 [2010]). "In considering a motion for summary judgment, the Court is not to resolve contested issues of fact, but rather is to

determine whether there exists any disputed issue of material fact. To evaluate a fact's materiality, the substantive law determines which facts are critical and which facts are irrelevant. While 'disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment[,] [f]actual disputes that are irrelevant or unnecessary will not be counted'" (id., quoting Anderson v Liberty Lobby, Inc., 477 US 242, 248 [1986]).

A. Hiring of an Imam

Plaintiffs do not allege in their complaint that Rev. Clapp violated their religious rights as it pertains to the hiring of an imam [see Ex. "A"]. Moreover, Rev. Clapp, as an employee of the County of Rockland, could not hire an imam [see Ex. "K" at page 10, 13]. No claim being asserted against Rev. Clapp in her personal capacity on this issue, and Rev. Clapp having no personal involvement in the hiring of an imam, she is entitled to summary judgment as a matter of law on this issue.

B. Muslim religious services within the Jail

Plaintiffs do not specifically assert an allegation as against Rev. Clapp regarding holding of religious services in the barbershop [see Ex. "A"]; nonetheless, Rev. Clapp has met her prima facie burden and plaintiffs have failed to raise a triable issue of fact. As set forth in the affidavits of Captain Conjura and Rev. Clapp, all religious services were held in Multipurpose Room No. 2, and no religious services would be held in the barbershop unless Multipurpose Room No. 2 was unavailable because some other jail program was scheduled at that time. Moreover, from a logistical standpoint, Rev. Clapp was suspended as of April 12, 2007 [see Clapp Aff.; Ex. "F"], and would have had no involvement whatsoever in the location of prayer services for the remaining time period alleged in the complaint. Furthermore, even assuming the allegations in

the plaintiffs' complaint are true, plaintiffs have failed to establish, as a threshold matter, that any inconvenience from having prayer services in the barbershop during the six-week period alleged in the complaint was a substantial burden on their religious rights (see Guarneri v Hazzard, 2010 WL 1064330, at *17). Again, the plaintiffs do not dispute defendants' contention that during the time period alleged in the complaint, Muslim prayer services continued uninterrupted and were facilitated by plaintiff Kenneth Kidd, as spiritual leader among the Muslim inmate population [see Conjura Aff.; Clapp Aff.; Plaintiffs' Ex. "B" and Ex. "C"]. Reverend Clapp has established her prima facie entitlement to judgment as a matter of law on this issue and plaintiffs have failed to raise a triable issue of fact sufficient to defeat summary judgment.

C. Use of the Koran

Plaintiffs allege that Rev. Clapp refused to permit the plaintiffs use of the Koran from March 26, 2007 through May 7, 2007 [see Ex. "A"]. Again, from a logistical standpoint, Rev. Clapp was suspended from her employment on April 12, 2007 [see Clapp Aff.; Ex. "F"] and, therefore, could not have denied plaintiffs use of their Korans during the remaining time period in the complaint. Moreover, as set forth in the affidavits of Captain Conjura and Rev. Clapp, Rev. Clapp was not involved in and had no decision-making authority with regard to the administrative policy involving distribution of the Noble Koran [see Conjura Aff.; Clapp Aff.; Ex. "K" at 13]. Rev. Clapp, in her personal capacity, did not deprive the plaintiffs of use of the Noble Koran or of the jail approved translation [see Clapp Aff.]. Rev. Clapp distributed approved translations of the Koran to the inmate population in accordance with her responsibilities [see Clapp Aff.]. In their supporting affidavits in opposition, neither Kenneth Kidd nor Kim Vasquez dispute that Rev. Clapp distributed jail approved Korans to the inmate population in accordance with her responsibilities [see Plaintiffs' Ex. "B" and Ex. "C"]. Plaintiff

Vasquez's conclusory statements regarding the content of and the administrative policy regarding the Noble Koran have no bearing on the claim alleged against Rev. Clapp in her personal capacity. Moreover, Plaintiff Kidd's affidavit states nothing more than conclusory and unsubstantiated allegations that Rev. Clapp interfered with his ability to purchase the Koran. He does not state when he attempted to purchase the Koran or in what manner Rev. Clapp "interfered" with him "trying to get the documents needed to buy the holy texts" [see Plaintiffs' Ex. "C" at paragraph 35]. Furthermore, whether a former inmate personally held Rev. Clapp responsible for the Jail's policy is of no relevance [see Plaintiffs' Memorandum of Law at page 20]. The fact remains that plaintiffs have failed to put forth any competent evidence to dispute that Rev. Clapp had no involvement in the administrative policy or that she, in fact, failed to permit plaintiffs use of their Korans. Based on the foregoing, Rev. Clapp has established her prima facie entitlement to judgment as a matter of law on this issue and plaintiffs have failed to set forth a triable issue of material fact sufficient to defeat summary judgment.

D. Distribution of the Subject Tracts

Contrary to plaintiffs' contentions, Rev. Clapp has established her prima facie entitlement to judgment as a matter of law on the issue of the distribution of the subject tracts. Plaintiffs' attempts to distort and mischaracterize both Rev. Clapp's statements in her supporting affidavit and the findings of Arbitrator Paul Bailey do not create a triable issue of fact sufficient to defeat summary judgment. Moreover, many of plaintiffs' allegations, raised for the first time in their supporting affidavits and not contained in the complaint, are equally unavailing.

The affidavit of Rev. Clapp together with the other exhibits submitted in support of her motion for summary judgment establish that the distribution of the two subject tracts was a single isolated incident during which the subject tracts circulated in the jail for two or three days

and which amounted to nothing more than mere negligence and an administrative error on her part.

“Plaintiffs challenging asserted deprivations of due process under 42 U.S.C. § 1983 must demonstrate, inter alia, that the defendant acted with more than mere negligence” (Houriha v Lafferty, 58 F Supp 2d at 15). Negligence will not carry a §1983 claim against a defendant in his or her individual capacity (see e.g. Bryant v Maffucci, 923 F2d at 983-984; Edwards v City of New York, 2009 WL 2596595, *2 [SD NY 2009]; Tafari v Annets, 2008 WL 2413995, *17; Young v Scully, 1993 WL 88144, *7 [SD NY 1993]; Hawkins v New York State Dept. of Correctional Servs., 2008 WL 2019655, *5 [ND NY 2008]; Odom v Dixon, 2008 WL 466255, *11 [WD NY 2008]).

Rev. Clapp attests that she did not see or read the subject tracts prior to placing them, together with a number of other religious materials, on tables in two of the prison wings [see Clapp Aff.]. Plaintiffs attempt to create an issue of fact by claiming that because Rev. Clapp had distributed tracts from Chick Publications over the years, she somehow must have known that the subject tracts were contained within the bundles of tracts she distributed on March 26, 2007 [see Plaintiffs’ Statement of Material Facts Pursuant to Local Rule 56.1, paragraph 2]. However, the proof before the Court points to the direct opposite conclusion. Rev. Clapp had distributed tracts from Chick Publications for years without a single incident or complaint; that she had distributed tracts from Chick Publications for years does not even remotely establish that she would have known that the subject tracts were within the bundles she distributed on March 26, 2007.

Plaintiffs also rely on the content of an internet “Wikipedia” entry to suggest that “Clearly, Chaplin Clapp must have been aware of the controversial nature of all Chick

Publications prior to distributing these specific tracts, and if not, the breach of her duty to distribute religious literature is even more apparent by her reckless distribution of literature from a hate group” [see Plaintiffs’ Memorandum of Law at page 28]. The “Wikipedia” website entry is irrelevant, hearsay, unauthenticated, and has no bearing on the issues before the Court (see Crispin v Christian Audigier, Inc., 717 F Supp 2d 965, 977 n 19 [CD Cal 2010]; Rainey v Grand Casinos, Inc., 47 So3d 1199, 1204 [Miss App 2010] [“Wikipedia defines itself as ‘the free encyclopedia that anyone can edit.’ The articles written in Wikipedia are collaborative and authored anonymously; thus, any information found on Wikipedia may not be reliable and should be viewed with skepticism”]; Campbell v Secretary of Health & Human Servs., 69 Fed. Cl. 775, 781 [2006]).

Rev. Clapp states that in the years that she has worked as Jail Chaplin, she has never once received a complaint regarding Chick Publication tracts [see Clapp Aff.]. Plaintiffs do not refute this contention nor do they point to any other instance in which Rev. Clapp distributed religious materials that were inflammatory to Islam [see Plaintiffs’ Ex. “B” and Ex. “C”]. As Rev. Clapp had not seen or read the subject tracts prior to placing them on the tables, the title or depictions of the cover of the tracts would not have alerted her to their content [see Plaintiffs’ Statement of Material Facts pursuant to Local Rule 56.1].

While plaintiff Kidd alleges in his affidavit that on March 27, 2007, Rev. Clapp gave him the two page document attached as plaintiffs’ Exhibit “H” and told him that the tracts from Chick Publications were correct, during Captain Conjura’s investigation conducted on April 16, 2007, when asked if he tried to see Rev. Clapp about the pamphlets, he stated to Captain Conjura that Rev. Clapp would not see him [see Ex. “H”].

Notably, plaintiff Kidd gave testimony at the disciplinary hearing of Rev. Clapp [see Ex. “K” at pg 12]. Arbitrator Bailey noted that plaintiff Kidd “confirmed that Reverend Clapp never discriminated against him on the basis of his religion or attempted to convert him, and said that she is a fine Chaplin” [see Ex. “K” at pg 12].

Of note, plaintiffs’ affidavits raise a number of allegations and/or new theories of liability that were not raised in their complaint; contain hearsay allegations and/or allegations not based on personal knowledge, as well as allegations which are unsubstantiated. For instance, in their complaint, plaintiffs do not allege that any physical altercations occurred between themselves and other inmates [see Ex. “A”]; however, plaintiff Vasquez [see Plaintiffs’ Ex. “B”] and plaintiff Kidd [see Plaintiffs’ Ex. “C”], now allege that other inmates physically assaulted and/or threatened them in connection with the subject tracts. Captain Conjura attested in his affidavit that other than the incident between inmate Lydell Watts and Rakeen Whatley, no other disputes or incidents were reported in connection with the subject tracts [see Conjura Aff.]. Furthermore, many of plaintiffs “new” allegations have no bearing on whether the isolated incident regarding the distribution of the subject tracts constituted a violation of plaintiffs’ constitutional rights by Rev. Clapp in her personal capacity. Factual issues created solely by an affidavit created to oppose a summary judgment motion are not ‘genuine’ issues of fact” (Odom v Dixon, 2008 WL 466255, *4; see Tafari v Annets, 2008 2413995, *9; see Guarneri v Hazzard, 2010 WL 1064330, *7 [“irrelevant or unnecessary facts do not preclude summary judgment, even when they are in dispute”]; Ramsey v Goord, 661 F Supp 2d 370, 384 [WD NY 2009] [“Vague assertions supported only by self-serving statements in the nonmoving party’s affidavit are insufficient to defeat a properly supported summary judgment motion”]; Johnson v Newton, 2007 WL 778421,

*2 [ND NY 2007] [“The non-moving party must do more than merely show that there is some doubt or speculation as to the true nature of the facts”]).

Plaintiffs’ are correct in their assertion that Rev. Clapp was *charged* with gross negligence; however, Arbitrator Bailey found Rev. Clapp negligent, not grossly negligent [see Ex. “K” at 15, 19-20]. Nowhere in his opinion does Arbitrator Bailey find or otherwise state that Rev. Clapp acted with gross negligence. Most importantly, Arbitrator Bailey specifically found that “the [County’s disciplinary] charges that [Rev. Clapp] intentionally or maliciously brought inflammatory or proselytizing literature into the Rockland County Correctional Center are without merit” [see Ex. “K” at pg 18]. Arbitrator Bailey further noted that “on the issue of discrimination, inmate Kidd and former inmate Hill testified that in their judgment, the employee was a fine Chaplain, and that she never discriminated against them on the basis of their religion” [see Ex. “K” at pg 18]. The disciplinary finding against Rev. Clapp was in no way related to intentionally or maliciously bringing the materials into the jail, or intentionally or maliciously attempting to proselytize or discriminate against Muslim inmates. Arbitrator Bailey found cause to discipline Rev. Clapp because her conduct in distributing bundles of pamphlets put together by civilians without having inspected them first for contraband was a breach of security [see Ex. “K” 15, 19-20].

Here, Rev. Clapp placed a number of religious materials on tables in the Jail. Within these materials were bundles of tracts from Chick Publications, and contained within those bundles were the subject tracts. That Rev. Clapp did not examine or read each of the materials prior to placing them on the tables was not an intentional or malicious act intended to deprive the plaintiffs of their constitutional rights nor was her conduct deliberate indifference. Instead, Rev. Clapp’s conduct was, at most, a negligent administrative error (see Tafari v Annets, 2008 WL

2413995, *17; Young v Scully, 1993 WL 88144, *7; Hawkins v New York State Dept. of Correctional Servs., 2008 WL 2019655, *5; Odom v Dixon, 2008 WL 466255, *11). Plaintiffs' have failed to put forth proof, other than plaintiffs' conclusory statements, that Rev. Clapp's actions were the result of deliberate indifference, gross negligence, or intentional or malicious conduct or otherwise amounted to a violation of their constitutional rights. Based on the foregoing, plaintiffs' complaint on this issue should be dismissed.

CONCLUSION

For all of the foregoing reasons, defendants respectfully requests that the Court grant the instant motion for summary judgment and such other and further relief deemed just and proper.

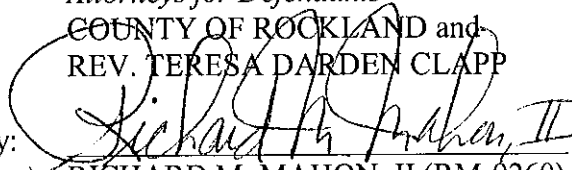
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January 19, 2011

Respectfully submitted,

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